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In the Supreme Court of the United States

October Term A.D. 1940

No.

NORTHWESTERN BREWERS SUPPLY COMPANY, and STURDY-BILT EQUIPMENT CORPORATION,

Petitioners,

vs.

WILLIAM J. SCHMIT, Trustee,

Respondent.

In the Matter of DELTA BREWING COMPANY, a Corporation,

Bankrupt.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To *The Honorable,* the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Sixth Circuit in the above case.

SUMMARY STATEMENT OF MATTER INVOLVED

The Delta Brewing Company went into reorganization proceedings under Chapter X of the Chandler Act in October, 1939 (R. 124). The appellants filed as secured creditors in said proceedings, the Northwestern Brewers Supply Company having a Conditional Sales Contract on a labeling machine and the Sturdy-Bilt Equipment Corporation having a Chattel Mortgage on a bottle washing machine (R. 1, 6).

In both claims appeared express reservations of "all rights and security" afforded by the respective Conditional Sales Contract and Chattel Mortgage, coupled with an express denial that "by filing this claim" were there waivers of the same. (R. 5-7).

The reorganization failed. The Court adjudicated the debtor bankrupt on February 21, 1940, providing in its order that claims filed, together with objections, be referred to the Referee in Bankruptcy and that claims filed in the reorganization proceedings be considered filed in the bankruptcy proceedings (R. 18). No objections have been made to appellants' claims as proper secured claims. They were recognized as such throughout the proceedings (R. 29, 31, 34, 36, 38 and 89). No issue has been raised in that regard.

Upon the adjudication of bankruptcy, the reorganization receiver petitioned to permit trustee to sell all assets free and clear or in whatever way deemed best (R. 19). On March 12, 1940, the Trustee in Bankruptcy was appointed (R. 23, 25). An effort was made on that day to obtain adequate bids on public sale. The bankrupt's assets were offered in various ways, including free and clear of various liens. The appellants promptly objected

unless the Trustee could show that an amount could be obtained in excess of the liens (R. 23). Formal objections followed (R. 51, 106). Further objections were made in open Court (R. 55), the real estate mortgagees objecting similarly. Acknowledged encumbrances on the property were:

Real Estate Mortgage, including interest (R. 22)	$50,031.00
Northwestern Brewers Supply Company, with interest from July 9, 1938 (R. 4)	1,400.00
Sturdy-Bilt Equipment Corporation, with interest (R. 6)	2,018.00
Klein Filter & Mfg. Company (R. 29)	1,000.00
TOTAL	$54,449.00
Real Estate Taxes (R. 44, 90)	8,812.40
TOTAL	$63,261.40
Net operating loss during reorganization (R. 93)	8,003.60
Unpaid Trustee's notes, plus interest (R. 93)	5,000.00
Petition for allowance of expenses by reorganization trustee (R. 93)	1,578.66
Fees of reorganization trustee (R. 93)	2,000.00
Petition for attorney's fees (R. 93)	229.02
Fees of reorganization Referee in Bankruptcy (R. 93)	532.00
Attorneys' fees for Rushton (R. 94)	350.00
Estimate of administration expenses in bankruptcy proper (R. 90)	3,000.00
Total Expenses	$20,693.28
GRAND TOTAL	$83,954.68

The property (R. 72) was appraised at $65,929.27; separate appraisal on appellants' machinery was as follows (R. 73-74): Northwestern Brewers Supply Company, $1488.00; Sturdy-Bilt Equipment Corporation, $1855.00. The land and buildings were appraised at (R. 72) $35,500.00.

The sale was adjourned to March 27, 1940. No adequate bid was made. A bid for $26,800.00, free of liens, was not accepted (R. 40-41).

The sale was adjourned to April 2nd, 1940. The bid of $26,800.00 was not accepted. The Referee declared the bids inadequate (R. 63) and directed private sale. Bidders present asked for further notice before any sale was made, so that they could meet any bid (R. 63). No further notice was given. Instead, on April 11, the *Trustee privately accepted the inadequate bid of $26,800.00* in two parcels: (1) $3800.00 for unencumbered personalty, except $171.00 due on a truck; and (2) $23,000.00 for all encumbered property, including real estate and appellants property, free of liens (R. 69, 71, 92).

The only notice that appellants had of acceptance of this bid was a letter sent by Referee on April 12th. The sale was confirmed on April 11, 1940 (R. 92).

The sale was made for the avowed purpose of paying administration expenses and losses. There were no other assets. (R. 90, 92, 93, 94, 107). The record fails to show notice to the lien holders of authority to borrow money in reorganization.

The lower court rendered its opinion upon petitions for review on May 28, 1940, and an order was entered on the same day confirming the Referee's sale (R. 110, 111). Appellants' appeal to the Circuit Court of Appeals followed where the lower court was affirmed.

JURISDICTION

On January 14, 1941, the Circuit Court of Appeals entered its decision sustaining the lower court on the ground that "in the absence of a petition for reclamation or the filing of a claim for priority as secured creditors there was no error" (R. 135). Petition for rehearing was denied on February 12, 1941. This petition for Writ of Certiorari has followed. Stay of Mandate was granted March 4, 1941.

The issues here presented arise in bankruptcy proceedings pending in the United States District Court for the Western District of Michigan, Northern Division, and the jurisdiction of this Court is invoked under the Bankruptcy Act, Sec. 24c, 11 U.S.C.A. 47(c) and the Judicial Code, Sec. 240, 28 U.S.C.A. 347(a) relating to the issuance of Writs of Certiorari in bankruptcy proceedings and civil cases.

QUESTIONS PRESENTED

I.

Does the Bankruptcy Act as amended require a secured creditor to file a claim for priority or for reclamation in addition to a secured claim before the date of sale of assets in the hands of the Trustee?

II.

Will the Trustee in Bankruptcy be permitted to sell in bulk commingled real and personal property constituting the bankrupt's estate, free and clear of uncontested liens for which secured claims have been filed where the purchase price is insufficient to satisfy the lien claims and where no proportionate payment has been or could be determined?

III.

Does a creditor who has filed an uncontested secured claim waive such security so as to subordinate the right of the claimant in the proceeds to the expenses of administration, or is he estopped from claiming his security by consenting to proceedings under Chapter X of the Bankruptcy Act and permitting Trustee to remain in possession of assets claimed as security?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals which this Court asked to review (1) is in conflict with decisions of other Circuit Courts of Appeal, (2) is in probable conflict with its own decisions, or (3) resolves a question which may be unsettled by reason of the enactment of the Chandler Act in a fashion contrary to the effect and purpose of decisions of parallel courts prior to the passage of the amended bankruptcy act.

The decision of the Circuit Court of Appeals is brief and without citation of authority affirms the order of the District Court confirming a sale of a Trustee in Bankruptcy over the objection of appellants, claimants holding security instruments, because the appellants had not filed claims for "priority as secured creditors" or reclamation proceedings before the date of sale. The decision questioned for the first time in the case the procedure of the appellants in filing their secured claims. At no time has the validity of the lien been challenged. Until this decision, the questions presented were those identified above as II and III. Since these questions are essential to a complete determination of whether the Trustee's sale shall be confirmed, we believe they properly should be presented to the Court at this time.

I.

The holding of the Circuit Court of Appeals for the Sixth Circuit in this case, requiring a secured claimant to file a claim for priority or a petition for reclamation in addition to a secured claim is contrary to the holding of this Court and other Circuits in the following respects:

(a) No claim for priority or reclamation is required;

(b) The decision is unsupported by the Bankruptcy Act.

The respective claims of the appellants, which were denominated and filed as secured claims, set forth that "claimant reserves all rights and security afforded by said contract or otherwise and does not, by filing this claim, waive the same." (R. 5, 7) The claims have at no time been attacked either as to their fundamental nature as secured or upon a procedural basis.

Contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit Court in the instant case, no claim for priority is required under decisions of the various circuits as indicated in the cases cited in the footnotes hereto. Neither liens nor claimants thereon are affected by the priority provisions of the Bankruptcy Act as amended.[1]

A clear distinction has at all times been drawn between priority and secured claims. The rights of lienors under the state law are unimpaired in bankruptcy.[2] The great majority of the holdings, including the decisions of this Court, lay down the rule that, unless there is a definite

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[1]City of Dallas, et al vs. Ryan, et al (C. C. A. 5) 62 F. (2nd) 959; certiorari denied 289 U. S. 742; In re Joaquin Valley Packing Co., 295 F. 311; certiorari denied 265 U. S. 583.

[2]In re Lake's Laundry Inc. (C. C. A. 2) 79 F. (2nd) 326; certiorari denied 296 U. S. 622.

abandonment proved, no claim need be filed by the holders of security and the trustee gets no better title than the bankrupt had.[3]

A secured creditor, as defined in the Bankruptcy Act, Sec. 1(28), may have a claim allowed for the surplus over the value of the security as provided in Sec. 57(e) of the Act. Sec. 63, relating to debts which may be proved, does not refer to secured creditors. The decision of the Circuit Court of Appeals would necessitate the filing of a claim for priority, but Section 64 of the Bankruptcy Act dealing with priorities is not concerned with secured creditors. Before the enactment of the Chandler Act it was held that sections respecting the filing of claims referred to unsecured claims and Section 67(d) of the act expressly excepted liens given or accepted in good faith.[4] Section 67(d) is amended by the Chandler Act, but this does not appear to have altered the status of a person holding a valid secured claim.

The Circuit Court, whose decree this Court is asked to review apparently ignores its decision of *In re Voight-Pros't Brewing Co.,* 115 F. (2d) 733 decided Nov. 15, 1940, three other judges sitting, arising under § 77B. This case holds that property, title to which is retained under a conditional sales contract is not subject to reorganization proceedings.

The decision of the Circuit Court of Appeals in the instant case, therefore, in requiring the filing of a priority claim or reclamation proceedings prior to the sale by the Trustee, injects into the Bankruptcy Act a novelty unsupported by previous decisions and in conflict with them, unless the intervention of reorganization proceedings under Chapter X of the Bankruptcy Act has altered the basic conception of lien rights.

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[3]Yeatman vs. New Orleans Savings Institute, 95 U. S. 764; 24 L. Ed. 589. In re Cherokee Pub. Service Co. (C. C. A. 8) 94 F. (2nd) 53.

[4]Courtney vs. Fidelity Trust Co. (C. C. A. 6) 219 F. 57.

II.

The order of the Circuit Court of Appeals for the Sixth Circuit in this case, confirming the affirmance of an order for the sale by the Trustee, is contrary to the holding of this Court and other Circuits in the following respects:

(a) Courts of equity will not order a sale free and clear from liens where the purchase price is insufficient to pay off lien claimants.

(b) The sale would result in a violation of the constitutional protection afforded by the Fifth and Fourteenth Amendments to the Constitution.

Unchallenged liens, together with real estate taxes, totaled $63,261.40. This property was ordered sold for the sum of $26,800.00, free and clear of the liens. The record is barren of any indication of how the proceeds of the sale are to be used other than that it is intended to be applied to taxes and expenses of administration. (R. 67 Trustee's Petition for Confirmation) The estimated loss of operation in reorganization, together with fees therein and administration expenses in the bankruptcy after adjudication, total approximately $20,000.00.

The rule laid down by this Court has been that the equity power to order a sale of a bankrupt's property free from liens and encumbrances will not be exercised "if it appears that the amount of the encumbrances exceeds the value of the property".[5] The right to retain a valid lien until the debt secured thereby is paid is a substantial property right which may not be taken from the creditor consistently with the Fifth and Fourteenth

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[5]Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555; 79 L. Ed. 1593; 97 A. L. R. 1106.

Amendments to the Constitution of the United States.[6] A Trustee in Bankruptcy may not override valid liens.[7]

The confirmation of a sale such as that existing in this case would leave the lower court with the impossible task of attempting to determine the proceeds of the various securities in the composite price. The Trustee cannot distribute the proceeds for unauthorized loans or disbursements of the reorganization receiver or for administration expenses.[8]

III.

The holding of the Circuit Court of Appeals for the Sixth Circuit in the instant case can, if the position of the appellants is correct as to questions I and II, can be upheld only upon the basis that the Chandler Act requires an additional assertion of rights where proceedings under Chapter X have preceded the bankruptcy. This is contrary to the prevailing law for the following reasons:

(a) The Chandler Act does not diminish the rights of a lien claimant.

(b) Participation in reorganization proceedings does not operate as a waiver of lien.

If the secured claims in this matter are conceded to be valid and proper, and the Courts will not confirm a sale which will yield to lienholders insufficient to equal the amount of their liens, we must conclude that it was the Court's intention to apply the proceeds other than in

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[6]Security-First National Bank vs. Rindge Land and Nav. Co. (C. C. A. 2), 85 F. (2nd) 557; 107 A. L. R. 1240; certiorari denied 299 U. S. 613.

[7]Duparquet Huot & Munuse Co. vs. Evans, 297 U. S. 216; 56 S. Ct. 412, 415; 80 L. Ed. 591.

[8]Matter of Avorn Dress Co. (C. C. A. 2) 79 F. (2nd) 337.

satisfaction of liens. The only remaining justification for such an act would be that the Chandler Act has changed the existing law so as to permit such an application, unless the claimant takes the further steps mentioned in the opinion of the lower court.

Chapter X of the Chandler Act does not diminish the rights of a lien claimant[9], except under special circumstances[10] which do not appear in this case. Participation in reorganization proceedings does not operate as a waiver of lien in cases under Section 77B of the Bankruptcy Act in force prior to the enactment of the Chandler Act.[11]

Additional authorities, patently contrary to the holding in the instant case appear in the appended brief.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari issue under the seal of this Court to review the order of the Circuit Court of Appeals for the Sixth Circuit in the above case and that said order be reversed.

Respectfully submitted,

DAVID CHARNESS,
Attorney for Petitioners.

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[9]Chapter X, Section 200, Section 238, Section 238 (3).

[10]Section 116 (2).

[11]Coursey, et al, vs. International Harvester Co., et al (C. C. A. 10) 109 F. (2nd) 774; Hoehn vs. McIntosh (C. C. A. 6) 110 F. (2nd) 199.